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No. 82-

In the

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and
REGAL TUBE COMPANY,

Petitioners,

vs.

INDEPENDENCE TUBE CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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Dated: January 26, 1983

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QUESTIONS PRESENTED

This private action sought recovery under both state tort law and the federal antitrust laws for the identical injury to plaintiff's business. The courts below sustained the tort recovery and trebled the damages because they found a Sherman Act "conspiracy" between a parent corporation and its wholly-owned subsidiary to delay plaintiff's market entry. Two basic questions of federal antitrust law are presented:

1. What is the proper legal standard for determining when a parent corporation is capable of conspiring with its wholly-owned subsidiary in violation of the Sherman Act?

2. In a rule of reason antitrust case, can injury to competition be established without analysis of the structure of the relevant market and proof that defendants possess sufficient market power to have an adverse effect on that market?

PARTIES TO THE PROCEEDINGS

Petitioners Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company, were appellants below. Copperweld Corporation is a publicly held company. Approximately 66% of its outstanding common stock is held by Imetal, a French holding company. Various agencies of the French government hold a majority of the stock of Imetal. The remaining stock of Imetal is publicly traded. Copperweld Corporation holds a 46¼% interest in Guardian Oil Company, a 50% interest in Guardian Production Company and a 45% interest in Japan Alumoweld Company, Ltd.[1]

Regal has no subsidiaries.

Respondent Independence Tube Corporation and its president, David F. Grohne, were appellees below.

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[1]The remaining interests in those companies are held in the following percentages:

Guardian Oil Company	
Allegheny International Energy Corp.	46¼%
Other (Curtin & Co.; Fitch & Co.; Pavonis Ltd.; Venrock Associates; Vogt Associates; Brown Partners Ltd.; Fidelity Ventures Ltd.; Graylock Partners & Co.; Davenport & Co. of Virginia, Inc.; Red River Venture Inc. and certain individuals)	7.5%
Guardian Production Company	
Allegheny International Energy Corp.	50%
Japan Alumoweld Company, Ltd.	
Fujikura Ltd.	45%
C. Itoh & Company, Ltd.	10%

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, Copperweld Corporation and Regal Tube Company, respectfully pray that a writ of certiorari issue to review the judgments of the Court of Appeals for the Seventh Circuit entered on October 1, 1982 and December 21, 1982.

OPINIONS BELOW

The opinion of the court of appeals on the merits is reported at 691 F.2d 310 and appears as Appendix A. The unreported opinion of the district court denying petitioners' motions for judgment notwithstanding the verdict and a new trial appears as Appendix B.

JURISDICTION

The judgment of the court of appeals on the merits was entered on October 1, 1982. (App. F) A timely Petition for Rehearing and Suggestion for Rehearing *En Banc* was

denied on November 1, 1982. (App. G)[1] Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

STATEMENT OF THE CASE

This is a case of a parent corporation found guilty of "conspiring" with its wholly-owned subsidiary. This "conspiracy" transformed a claim of interference with contractual relations under state tort law into a violation of Section 1 of the Sherman Act and an award for treble damages and attorneys' fees in excess of $9 million. The Seventh Circuit's affirmance of that award puts in issue whether the court applied erroneous legal standards in concluding: *first*, that petitioner Copperweld Corporation was capable of entering into a Sherman Act conspiracy with its wholly-owned subsidiary, petitioner Regal Tube Company, and *second*, that the conspiracy resulted in a restraint on trade, and not merely on respondent, when the relevant market remained structurally and functionally competitive before, during and after the asserted conspiracy.

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[1] On January 19, 1982, while the appeal on the merits was pending in the court of appeals, the district court entered judgment on respondent's request for attorneys' fees and costs under 15 U.S.C. § 15. That judgment was superseded by the district court's order and opinion of June 21, 1982 (App. C), as amended by its order and opinion of July 16, 1982. (App. D) On December 21, 1982, the court of appeals granted the petitioners' unopposed motion to enter judgment on the award of fees and costs and to consolidate that judgment with the judgment on the merits. (App. E)

1. Factual Background

The essential facts are not in dispute. Regal began its existence in 1955 as a Chicago firm manufacturing structural steel tubing for use in heavy equipment, vehicles and construction. From 1955 to 1968 Regal was a wholly-owned subsidiary of C.E. Robinson Company. In 1968 Regal was sold to and became an unincorporated division of Lear Siegler, Inc. In 1972 Regal was purchased by Copperweld and again set up as a wholly-owned subsidiary to avoid discriminatory double taxation by Pennsylvania (where Copperweld is headquartered) and Illinois. (691 F. 2d. at 313-14; App. A-3; Kaplan Tr. 5702; Smith Tr. 3051)

Under Copperweld, as before, Regal operated with its own separate facilities and plant personnel. Regal's headquarters, however, were consolidated with those of Copperweld in Pittsburgh; all of Regal's officers and directors were Copperweld officers and directors; and Regal's financial reports and SEC filings were fully consolidated with those of Copperweld. At no time were Copperweld and Regal held out as competitors and at no time did they actually compete. (691 F.2d at 314, 320; App. A-3, A-16-17; Breedlove Tr. 4875-84, 4892, 4900-02, 4909-10; Foster Tr. 4268)

When Regal was purchased by Copperweld in February 1972, its General Manager was David F. Grohne. Although Grohne was asked to continue in that capacity, he chose to become Lear Siegler's Corporate Secretary. While Grohne remained with Lear Siegler, but unknown to either his employer or Regal, he incorporated respondent Independence Tube Corporation and took steps to set it up as a competing steel tubing manufacturer. In December 1972, his new company gave The Yoder Company, a builder of manufacturing facilities for others, a purchase order for a mill to fabricate the tubing. (691 F.2d at 313-14; App. A-3; Grohne Tr. 373-75; Uzarowicz Tr. 4339-43)

Copperweld learned of respondent's plans in late 1972. Petitioners' Chairman sought legal advice on whether the

five-year non-competition agreement that Lear Siegler had signed when it sold Regal applied to Grohne as a former officer. Copperweld was advised that the agreement did not, but that respondent might be enjoined if it used any of the "know-how, technical information, designs, plans, drawings, trade secrets or inventions of Regal," which had been included in the sale. (691 F.2d at 314; App. A-4) Copperweld was further advised to send letters to a number of potential suppliers of respondent to notify them of petitioners' proprietary rights and prevent them from developing reliance interests that might later make a court reluctant to enter an injunction at Copperweld's behest. (*Id.*)

One of the Copperweld letters was sent to Yoder in February 1973. Yoder reacted by refusing to supply the tubing mill ordered by respondent. Although respondent secured an alternative supplier, its entry into the tubing business was delayed nine months. (*Id.*)[3] There was no evidence that petitioners' concern with what they felt was unfair competition by a former employee was part of a broader scheme to restrain competition by rival steel tubing manufacturers.

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[3] In addition to the letter to Yoder, the District Court found that petitioners' activities included: "telephone calls between [Copperweld] and the president of Abbey-Etna in December 1973, regarding the sale of a mill to Independence, repeated contacts between representatives of Copperweld and officials at Continental Bank and at First National Bank of Chicago concerning the banks' providing financing to Independence, contacts with real estate firms concerning their assisting Independence in finding plant space, contacts between Copperweld and prospective suppliers of steel and contacts with prospective purchasers of Independence's product." (App. B-7) Whereas respondent argued these activities were part of a scheme to keep it out of the tubing business, petitioners contended they were part of the effort to gather information and protect against respondent's invasion of Regal's proprietary rights. In practical terms the dispute is immaterial, since it was undisputed that the only "conspiratorial" act found by the jury to have injured respondent was the February 1973 letter to Yoder. (App. B-4)

Regal was one of a dozen firms in the national market and ranked second or third with a market share ranging from 12% to 16%. Petitioners never attempted to exclude any of these competitors or any other potential entrants from the structural steel tubing market. (PX 27, 475, 1015; Brozen Tr. 5563-64, 5593-95)

2. Proceedings Below

Respondent Independence commenced this action in the United States District Court for the Northern District of Illinois in 1976. Its complaint as amended alleged that petitioners had conspired with Yoder to block respondent's entry into the steel tubing market in violation of Section 1 of the Sherman Act, had attempted to monopolize that market in violation of Section 2 of the Sherman Act, and had interfered with respondent's contractual relations with Yoder.[4] Petitioners counter-claimed, charging Independence and Grohne with unfair competition by taking Regal's proprietary information and key employees. (691 F.2d at 314-15; App. A-5)

Before trial respondent dismissed its Section 2 claim. The district court directed a verdict against petitioners on their counterclaims and sent respondent's remaining claims to the jury. The jury found that there was no Section 1 conspiracy involving Yoder, but only between petitioners, and that Copperweld had tortiously interfered with respondent's contract with Yoder. At the subsequent damage trial, the district court instructed the jury that respondent's injury from petitioners' Section 1 conspiracy was identical to the injury from the interference with the Yoder contract, and the jury set both figures at $2,499,009. After trebling (and the award of $15,000 for the defamation claim), judgment was entered against petitioners for $7,512,027, plus reasonable attorneys'

[4] Respondent also alleged breach of contract by Yoder and trade defamation by petitioners, but those pendent claims are not in issue here.

fees and costs. (*Id.*) The fees and costs were later set at $1,814,673. (App. C)

On appeal, the Seventh Circuit affirmed the judgment in all respects. In response to "appellants' broadly based attack" on the finding of a conspiracy between Copperweld and its wholly-owned subsidiary, the court acknowledged that "[a]cademic discussion of the intra-enterprise conspiracy doctrine is almost uniformly critical." (691 F.2d at 316-17; App. A8-9; citing Handler and Smart, *The Present Status of the Intracorporate Conspiracy Doctrine*, 3 Cardozo L. Rev. 23 (1981), including the bibliography at 23 n.3, and Note, *"Conspiring Entities" Under Section 1 of the Sherman Act*, 95 Harv. L. Rev. 661 (1982)). The court explained:

> "The commentators generally note at the outset that the Supreme Court has never actually relied on the doctrine without qualification to decide a Sherman Act case, and therefore the broad language of some Supreme Court opinions must be taken at less than face value. They also point out that government enforcement agencies do not use the doctrine. Rather it surfaces in private suits—where plaintiffs rely on it to plead their way around basically unilateral action taken by an entity that lacks the market power to be sued under Section 2's monopolization standards. So used, the intra-enterprise conspiracy doctrine fills a gap between Section 1 and Section 2—a gap that should either remain entirely unfilled or be left to state-law remedies. Otherwise, the commentators argue, the real efficiencies achievable by separately incorporated but closely related corporations will be sacrificed, and the antitrust laws will be used perversely to achieve either more independence or more integration than is optimal." (691 F.2d at 317; App. A-9-10; footnotes omitted)

Despite these compelling objections, the Seventh Circuit stated that judicial reactions to the intra-enterprise conspiracy doctrine have been "constrained" by this Court's rulings since, "while they need not be read with complete literalism,

of course they cannot be ignored." (*Id.*; footnote omitted) The result has been substantial divergence among the circuits, as they have adopted "various limiting approaches—but no move to abolish the doctrine root and branch." (*Id.* at 317-18; App. A-11)

The Seventh Circuit stated that its own approach had been established in *Photovest Corp.* v. *Fotomat Corp.*, 606 F.2d 704 (7th Cir. 1979), *cert. denied*, 445 U.S. 917 (1980). It characterized its "test" as focusing on "a variety of factors" indicating "when there is enough separation between the two entities to make treating them as two independent actors sensible" for conspiracy purposes. (*Id.* at 318; App. A-11) It then sustained an instruction by the district court that made no mention of three of the five "factors" earlier relied upon in *Photovest*, including "the extent of the integration of ownership" between parent and subsidiary. The instruction approved by the court of appeals substituted a new nine-point test that concluded:

> "You must consider all of the facts, and that includes the nine I have given you here, *and any other facts that you think are relevant* to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other." (691 F.2d at 332; App. A-41)[5]

The court recognized that its ruling left the applicable test in an "unsettled stage of development," but asserted that "the uncertainties that necessarily exist now will be obviated as the test is applied and refined." (*Id.* at 318; App. A-11-12)

Turning to the question whether respondent's delay in entering the structural steel tubing market had any adverse effect on competition, the Seventh Circuit rejected petitioners' reliance on *Havoco of America, Ltd.* v. *Shell Oil Co.*, 626 F.2d 549 (7th Cir. 1980), in which the court had ruled: "[W]here the challenged restraint [takes] the form of unfair

[5] Emphasis has been added, except where otherwise stated.

competition, we think that the *market power of the defendant*, both before and after the allegedly anticompetitive conduct *is a particularly important factor*" to consider. (*Id.* at 558) The court turned aside petitioners' argument that the jury and the reviewing court were required to consider the record evidence that the structural steel tubing market was at all times competitively structured and that petitioners' market share fell well below the threshold for anticompetitive concern. According to the court, "*Havoco* does not say that harm in the relevant market is demonstrable only by market share evidence, but rather that the relevant market must be defined with enough generality to ensure that harm to competition is not assumed where no more than harm to a person engaged in interstate commerce is shown." (691 F.2d at 322; App. A-21-22) The court also stated that the market share analysis applied in *Havoco* was required only where "an actual competitor is harmed or driven out of business," and not in a case involving the "foreclosure" of a new entrant. (*Id.*)

REASONS FOR GRANTING THE WRIT

The result below elevates a private commercial controversy, properly cognizable under state tort law, into a violation of national competition policy punishable by treble damages. In doing so, it points up the need for this Court to settle two issues of recurring controversy under the antitrust laws. *First*, this Court should re-examine the intra-enterprise conspiracy doctrine—which has led to confusion among the circuits and the business community and generated results inconsistent with rational antitrust principles—and rule that a parent and its wholly-owned subsidiary are incapable of a Sherman Act conspiracy. *Second*, this Court should confirm that defendants cannot be found liable in rule of reason cases without a careful analysis of market structure and market shares to establish an adverse effect on competition.

I. This Court Should Re-examine The Intra-Enterprise Conspiracy Doctrine And Rule That A Wholly-owned Subsidiary Is Incapable Of A Sherman Act Conspiracy With Its Parent.

This Court first announced the broad outlines of the intra-enterprise conspiracy doctrine in *United States* v. *Yellow Cab Co.*, 332 U.S. 218 (1947). Thirty-five years later, the Seventh Circuit has put forward a test for its application that it frankly describes as still in "an early and unsettled stage of development." (691 F.2d at 318; App. A-11) Using this test the court of appeals has sustained an award of treble damages for actions that would have constituted only tortious interference with contract had they been carried out scarcely a year earlier, when Regal operated as an unincorporated division rather than a subsidiary corporation.[6] This random result illustrates the general confusion among the circuits, dramatizes the irrationalities in the doctrine's application, and underscores the need for this Court to fashion a new rule that is consistent with sound antitrust principles.

A. The disarray among the circuits.

The intra-enterprise conspiracy doctrine has spawned nearly 190 reported decisions since *Yellow Cab*.[7] Yet the circuits have been unable to arrive at a consistent, or even reconcilable, rule for its application. Respected commentators have concluded that "[t]he cases, commentary and settled practices are in disarray" (Sullivan, *Handbook of the Law of Antitrust* § 114 at 323 (1977)); that the doctrine "invites the inappropriate or even irrelevant application of

[6] The courts agree that an unincorporated division is not a separate entity capable of conspiring with the parent in violation of Section 1. *E.g., H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244 (5th Cir. 1978); *Joseph E. Seagram & Sons, Inc.* v. *Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 82-84 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

[7] A compendium of these decisions appears as App. H. Whereas there were only 17 decisions in the ten years following *Yellow Cab*, there were over 125 in the last decade.

substantive rules designed to deal with cartel or other truly conspiratorial behavior" (Areeda, *Antitrust Analysis* ¶ 334 at 401 (3d ed. 1981)); and that "it exalts form over substance without providing any countervailing antitrust benefits." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 72)

The Ninth Circuit dramatically describes the confusion among the circuits: "The antitrust cases determining the existence or absence of any intra-enterprise conspiracy, when taken collectively, resemble a thaumatrope.[8] Rules seemingly clear on their face become an unresolved conceptual blur when applied to the variant fact situations presented by diverse economic entities and functional structures." *Mutual Fund Investors, Inc.* v. *Putnam Management Co.*, 553 F.2d 620, 625 (9th Cir. 1977). Summed up succinctly: "The circuits . . . do not agree on the limits of [the] intra-enterprise conspiracy doctrine." *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 587 (8th Cir. 1981)

At least five divergent tests have been developed for the doctrine's application. Applied in ad hoc fashion, sometimes inconsistently within the same circuit, these tests provide no legal standard that is either theoretically defensible or practicably workable.

The test advanced by the court below is illustrative. Aptly described as the "all the facts and circumstances" test,[9] it

[8] "[A] scientific toy illustrating the persistence of visual impressions, consisting of a card or disc with two different figures drawn upon the two sides, which are apparently combined into one when the disc is rotated rapidly . . . ." II *The Compact Edition of the Oxford English Dictionary* at 3278 (Oxford Press 1971)

[9] Handler & Smart, *supra*, 3 Cardozo L. Rev. at 55. In addition to the Seventh Circuit, this test has been adopted on occasion by the Eighth and Ninth Circuits. *E.g., Las Vegas Sun, Inc.* v. *Summa Corp.*, 610 F.2d 614, 617-19 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Ogilvie* v. *Fotomat Corp.*, 641 F.2d 581, 588 (8th Cir. 1981). *But see Minnesota Bearing Co.* v. *White Motor Corp.*, 470 F.2d 1323, 1328-29 (8th Cir. 1973).

gives the jury free rein to consider nine separate "variables" plus "*any other facts that you find that are relevant* to a determination of whether or not Copperweld and Regal are separate and distinct companies capable of conspiring with each other." (*Id.* at 332; App. A-41) Although put forward as "a reasonable and pragmatic approach to the intra-enterprise conspiracy problem" (691 F.2d at 318; App. A-12), its very formulation accentuates the indeterminacy that plagues the doctrine.

The Seventh Circuit itself acknowledged "the uncertainties that necessarily exist" in its approach, which involves "the presence or absence of various unranked factors" and "the possibility that the list will expand or contract." (*Id.*) Handler and Smart correctly point out that such an open-ended approach gives the intra-enterprise conspiracy doctrine "no precise contents or contours, so it is difficult, if not impossible, to predict what facts will satisfy it. . . . [W]here the case is tried to a jury, the jury should not be left adrift in an uncharted sea to determine whether separate but affiliated companies function as a single economic unit." (3 Cardozo L. Rev. at 59-61.)[10]

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[10] The Seventh Circuit rationalized the verdict *ex post facto* on evidence that Copperweld acquired Regal to enter a new market, permitted Regal to continue to serve that market, left substantial operating authority in local management, which had a separate sales force and made its own arrangements with suppliers, and compensated that management primarily on the basis of Regal's profits. (691 F.2d at 320; App. A-16-17) Yet, comparable evidence could be adduced regarding nearly every firm that operates a new subsidiary under modern management techniques giving autonomy to local management. (*See, e.g.*, P. Drucker, *Management* 575, 579-80 (1974)). Penalizing such a firm turns the intra-enterprise conspiracy doctrine on its head: "Far from encouraging parent and subsidiary to act as independent decisionmakers, such a test inevitably will encourage parents to exercise their control to the fullest extent." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 75.)

The four alternative formulations of the intra-enterprise conspiracy doctrine adopted in other circuits only add to the confusion, without providing a supportable basis for the doctrine's application:

> **The "holding out" rule**, suggested by the Second Circuit and at least one court in the Sixth Circuit, finds no conspiracy if the affiliated corporations have not held themselves out or actually functioned as competitors.[11] While this test would lead to a different result here, and derives from language in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951) (*see* p. 18 n. 17 *infra*), it has been criticized because the indicia of "holding out" have never been delineated and no clear relationship with legitimate antitrust concerns has been articulated. (*See* Note, *supra*, 95 Harv. L. Rev. at 669-70; Handler & Smart, *supra*, 3 Cardozo L. Rev. at 55. *But see* Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20 (1968))
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> **The "sole decisionmaker" rule**, endorsed by the Fourth and Ninth Circuits, finds no capacity when the affiliated corporations are owned and controlled by one person who had the power to make decisions as to both.[12] Although the commentators commend the test for focusing on ultimate legal control, they find no basis for limiting its no capacity finding to cases where the sole owner made the challenged decision. (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 48-49)

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[11] *E.g., Triebwasser & Katz* v. *AT&T*, 535 F.2d 1356, 1358-59 (2d Cir. 1976); *Aaron E. Levine & Co.* v. *Calkraft Paper Co.*, 429 F. Supp. 1039, 1045 (E.D. Mich. 1976). *But see William Inglis & Sons Baking Co.* v. *ITT Continental Baking Co.*, 668 F.2d 1014, 1054-55 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982) (rejecting the rule); *Diehl & Sons, Inc.* v. *International Harvester Co.*, 426 F. Supp. 110, 117 (E.D.N.Y. 1976) (same)

[12] *E.g., Windsor Theatre Co.* v. *Walbrook Amusement Co.*, 94 F. Supp. 388, 396 (D. Md. 1950), *aff'd*, 189 F.2d 797 (4th Cir. 1951); *Harvey* v. *Fearless Farris Wholesale, Inc.*, 589 F.2d 451 (9th Cir. 1979).

The "external effect" rule, applied by several district courts, finds no conspiracy where the concerted action is "internal" and restrains no outsider's trade.[13] This rule has been criticized as "unworkable and unreal" (see *Ogilvie, supra,* 641 F.2d at 588 n.20) in attempting to segregate corporate decisions that necessarily have some effect on third parties into abstract categories of "internal" and "external." The result has been to treat similar conduct as "external" and "internal" in different cases. *Compare Murphy Tugboat Co.* v. *Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841, 860 (N.D. Cal. 1979), *aff'd*, 658 F.2d 1256 (9th Cir. 1981) *with Universal Lite Distributors, Inc.* v. *Northwest Indus. Inc.*, 452 F. Supp. 1206, 1216 (D. Md. 1978), *rev'd in part on other grounds*, 602 F.2d 1173 (4th Cir. 1979).

The "absolute" rule of the First, Third and Fifth Circuits holds that, as a matter of law, a parent and its wholly-owned subsidiary are always capable of conspiracy, without further inquiry.[14] This rule is in apparent conflict with recent decisions of this Court discussed at pp. 18-19 *infra* and makes the inevitable communications among affiliates into self-proving conspiracies. (Note, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard*, 75 Mich. L. Rev. 717, 727-29

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[13] *E.g., REA Express, Inc.* v. *Alabama Gr. S.R.R.*, 427 F. Supp. 1157, 1166 (S.D.N.Y. 1976), *aff'd mem. sub nom. Sowerwine* v. *United States*, 431 U.S. 961 (1977); *Thomsen* v. *Western Electric Co.*, 512 F. Supp. 128, 132-33 (N.D. Cal. 1981), *aff'd*, 680 F.2d 1263 (9th Cir.), *cert. denied*, 103 S. Ct. 348 (1982).

[14] *E.g., George R. Whitten, Jr., Inc.* v. *Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975); *Columbia Metal Culvert Co.* v. *Kaiser Alum. & Chem. Corp.*, 579 F.2d 20, 33-34 & n.49 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *H&B Equipment Co.* v. *International Harvester Co.*, 577 F.2d 239, 244-45 (5th Cir. 1978). *But see White* v. *Hearst Corp.*, 669 F.2d. 14 (1st Cir. 1982); *Ark Dental Supply Co.* v. *Cavitron Corp.*, 461 F.2d 1093, 1094-95 n.1 (3d Cir. 1972).

(1977)). It is "like condemning the bi-sexual oyster for incest." (Stengel, *Intra-Enterprise Conspiracy Under Section 1 of the Sherman Act*, 35 Miss. L.J. 5, 27 (1963))

These conflicting approaches have splintered the intra-enterprise conspiracy doctrine into particularized rulings that frustrate intelligent planning by corporate managers and counsel. Consequently, responsible antitrust analysts from the academic community, the bar and the business world have increasingly urged its re-examination by this Court and the formulation of a new, consistent and realistic standard for its application. The recent article by Professor Handler and T.A. Smart, to which the Seventh Circuit several times referred, is a particularly comprehensive analysis of the shortcomings in the present doctrine.[15] The authors conclude, with language especially apt here:

> "When analysis is focused on antitrust policy as such, one can discern no basis for the intracorporate conspiracy concept. A review of the cases suggests that the intracorporate conspiracy doctrine does not promote competition or otherwise advance the purposes of antitrust, but more often serves principally as a tool for plaintiffs in private treble damage actions to attempt to reach single firm conduct which does not rise to the level of an attempt to monopolize or monopolization. Indeed, conduct that is of any real concern is already covered under existing antitrust statutes and the laws of unfair competition.
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> "We conclude that where a subsidiary is wholly owned or controlled by its parent or where affiliated corporations are wholly owned or controlled by the same parent, the policies of the antitrust laws would best be served by holding as a matter of law that the corpora-

[15] For the Court's convenience, petitioners have reprinted this article as App. I.

tions are incapable of conspiring." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 24-25; footnote omitted)[16]

Under present doctrine, unilateral conduct can become an antitrust conspiracy based on the purely formal distinction that a firm has acted through a subsidiary corporation rather than an unincorporated division, though each performs identical functions. "Rules based on such distinctions defy rational application and themselves promote behavior inconsistent with antitrust goals." (Note, *supra*, 95 Harv. L. Rev. at 662) The reason is that, by penalizing separate incorporation while allowing the same action by unincorporated divisions, "the only safe way to avoid violating the Sherman Act is to give up the advantages of multicorporate organization and consolidate into single legal units." (McQuade, *Conspiracy, Multicorporate Enterprises, And Section 1 Of The Sherman Act*, 41 Va. L. Rev. 183 (1955))

The Seventh Circuit agreed that abandonment of subsidiary operations can eliminate important efficiencies of benefit to the firm as well as the consumer. (691 F.2d at 317 n.7; App. A-10) Use of subsidiary corporations can permit small firm entrepreneurs who consolidate with larger enterprises to retain a minority interest in their own businesses, can accom-

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[16] Other illustrative commentaries include: Willis & Pitofsky, *supra*, 43 N.Y.U.L. Rev. at 21 ("the net result [of the existing case law] is thorough-going uncertainty—on the part of the business community, antitrust counsel, the enforcement agencies, and the courts—leaving no one able to point with confidence to the location of the boundary between legal and illegal business conduct"); Areeda, *supra*, at 401 ("[t]he present state of the intra-enterprise conspiracy doctrine is not easy to divine"); Comment, *All in the Family: When Will Internal Discussions Be Labeled Intra-Enterprise Conspiracy?*, 14 Duq. L. Rev. 63, 69 (1975) (there is a "universally-felt need to establish some limits on the intra-enterprise conspiracy doctrine"); Note, *supra*, 95 Harv. L. Rev. at 681 ("These [antitrust] goals would be best served by a Court ruling that related corporations are legally incapable of conspiring among themselves in violation of section 1")

modate differing personnel and incentive policies within a single corporate family, can improve management accountability and efficiency, can prevent discriminatory double taxation, can allow corporations to accommodate special investment conditions in foreign operations by encouraging minority foreign national investment, and can let firms comply with regulatory policies designed to insulate regulatory customers from outside business risks. (*E.g.,* The Bank Holding Act, 12 U.S.C. 1843(c) (requiring separate incorporation of designated non-banking businesses))

Under current doctrine an attempt to achieve any of these perfectly legitimate benefits—or to comply with legal requirements—is tied to heightened antitrust risk. This result would be rational only if separate incorporation, or the attendant benefits, were in some way related to a threat to competition. They are not. "The business, tax, social or strategic reasons for separate incorporation do not make it any more or less likely that competition is being harmed by the defendant's activities. The fortuity of independent incorporation does not serve to identify the behavior that the antitrust laws should control." (Areeda, *supra,* at 399-400)

The result of the doctrine is thus to "promote behavior inconsistent with antitrust goals by encouraging firms to select less efficient and more centralized forms of organization," without supplying any compensating advantages for antitrust policy. (Note, *supra,* 95 Harv. L. Rev. at 681) It is hardly surprising, as the Seventh Circuit itself acknowledged, that the commentators have been "almost uniformly critical" of the doctrine (691 F.2d at 316-17; App. A-9), or that they have reached the conclusion that "[t]he current disagreement among the circuits concerning the intra-enterprise issue demands resolution by the Supreme Court." (Note, *supra,* 95 Harv. L. Rev. at 681)

B. The need for clarification by this Court.

This Court's prior pronouncements are the source of much of the uncertainty concerning the precise scope of the intra-

enterprise conspiracy doctrine. Early opinions suggested a rule of sweeping application; more recent decisions have given a narrower cast to the doctrine. The result has been the understandable confusion among the circuits, the bar and the business community.

Typical of the earlier decisions is *Yellow Cab*. Defendants were a group of affiliated individuals and corporations charged with conspiring to restrain and monopolize taxi fleets in four metropolitan markets, in part through the acquisition of individual operators. The Court rejected the defense that the "restraints occur in a setting described by the appellees as a vertically integrated enterprise," by observing:

> "Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed." (332 U.S. at 227)

Noting the factual context of the case, the commentators have rightly emphasized that this language can be read as meaning simply that common ownership will not preclude liability where a series of acquisitions leads to an unreasonable restraint of trade or monopoly. "This is hardly a startling or disputable proposition and is far different from saying that affiliated corporations, because of the fact of separate incorporation, are in all circumstances subject to section 1." (Handler & Smart, *supra*, 3 Cardozo L. Rev. at 29) Nevertheless, as Professor Areeda has commented, *Yellow Cab* demonstrates "the tendency of judicial language, once launched, to continue in life independent of its roots or policy." (Areeda, *supra*, at 406; *see also* at 398)

Thus, the *Yellow Cab* language became a "rule" in *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 215 (1951); *Timken Roller Bearing Co.* v. *United States*, 341 U.S. 593,

598 (1951); and *Perma Life Mufflers, Inc.* v. *International Parts Corp.*, 392 U.S. 134, 141-42 (1968). There, the Court (per Black, J.) cited that "rule" without analysis, merely reiterating that "common ownership and control does not liberate corporations from the impact of the antitrust laws."[17] Yet, each of those cases could have been decided on an alternative basis. For example, commentators have pointed out that *Kiefer-Stewart* can be understood as simply a case of coerced vertical price-fixing between plaintiff and defendants. (Willis & Pitofsky, *supra*, 43 N.Y.U.L. Rev. at 45) In *Perma-Life* the Court itself suggested an alternative holding on just such a theory. (392 U.S. at 142) And *Timken* has been explained as a horizontal conspiracy between companies lacking a true parent/subsidiary relationship. (Note, *supra*, 75 Mich. L. Rev. at 722)

Significantly, in two of the Court's more recent decisions, it has declined to find a parent-subsidiary conspiracy after examining the economic realities of the corporate relationships under attack. In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 370 U.S. 19 (1962), the Court rejected a finding of conspiracy between Sunkist and two wholly-owned subsidiaries, "even though they have formally organized themselves into three separate legal entities." (*Id.* at 29) The Court reasoned that "[t]o hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of *de minimis* meaning and effect to these growers . . . There is no indication that the use of separate corporations had economic significance in itself or that outsiders considered and dealt with the three entities as independent organizations." (*Id.*)

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[17] The language of *Kiefer-Stewart* did contribute an additional variable to intra-enterprise conspiracy adjudication. There, this Court said: "The rule is especially applicable where, as here, respondents hold themselves out as competitors." 340 U.S at 215. This statement gave rise to the "holding out" rule discussed at p. 12 *supra*.

In its most recent ruling, *United States* v. *Citizens & Southern National Bank*, 422 U.S. 86 (1975), the Court refused to find a conspiracy between Citizens & Southern and a group of correspondent branch banks, although they were only five percent owned. The Court concluded that the challenged communications were an integral part of "the sharing of expertise and information which was at the heart of the correspondent associate programs." (*Id.* at 114) It distinguished the situation where "independent competitors have no permissible reason for intimate and continuous cooperation and consultation." (*Id.* at 113-14)

Particularly in light of *Sunkist* and *Citizens & Southern*, this Court should re-examine the "rule" of *Yellow Cab* and formulate new standards to remove the escalating confusion among the circuits and the resulting uncertainties for business planning.[18]

C. A principled and practical alternative to the existing confusion.

We urge this Court to hold as a matter of law that where a parent owns 100% of the voting stock of a subsidiary, or two subsidiaries are wholly-owned by a common parent, the affiliated corporations are incapable of a Sherman Act conspiracy. This rule would recognize that, where there is a complete unity of legal and economic interests, a parent and subsidiary should be viewed as a single enterprise. The proposed rule would remove the artificial distinctions between unin-

[18] This case presents a situation not unlike *Continental T.V., Inc.* v. *GTE Sylvania, Inc.*, 433 U.S. 36 (1977). Before *Sylvania*, the legality of distributor arrangements had come to depend on whether they could be characterized as a "sale" or a "consignment" relationship, a confusing distinction devoid of antitrust significance. As here, the existing rule had skewed business choices with a risk factor unrelated to efficient competition and the lower courts had developed conflicting exceptions to prevent some of the rule's more irrational effects. This Court resolved the conflict by adopting a new standard that looked to whether the vertical arrangement is likely to have meaningful anticompetitive consequences.

corporated divisions and wholly-owned subsidiaries and would no longer lead corporate managers to prefer the former without regard to the real efficiencies for the firm or the consumer.

Where one company has the legal authority to control the actions of another an "agreement" or "conspiracy" between the two companies does not add anything to the market power of the first company and does not affect the autonomy or economic independence of the second. The concerns of Section 1 of the Sherman Act are simply not implicated. If gaining legal control in itself presents antitrust concerns, that is, of course, the domain of Section 7 of the Clayton Act; if the conduct of the combined entity is anti-competitive, that is the domain of Section 2 of the Sherman Act. A conclusive rule based upon complete ownership recognizes both the practical reality of legal control and the integrity of the statutory scheme of the antitrust laws.[19]

Indeed, the same principles would support this Court's consideration of a broader rule that would preclude a finding of capacity whenever a parent owns more than 50% of a subsidiary. The latter approach is consistent with other regulatory and statutory approaches to the "control" issue. For example, the United States Department of Justice stated in its 1977 *Antitrust Guide For International Operations:*

> "[A] parent corporation may allocate territories or set prices for the subsidiaries that it fully controls. The Department's test has generally been formulated in

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[19] *See also Security Tire & Rubber Co.* v. *Gates Rubber Co.*, 598 F.2d 962, 967 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979), where the Fifth Circuit held that a transfer between a parent and a wholly-owned subsidiary could never be considered a "sale" for Robinson-Patman Act purposes: "The realistic effect on competition should control rather than esoteric and theoretical possibilities under . . . [a] theory couched in terms of 'control' and 'arm's length dealings.' . . . [U]nderlying substance controls surface form in economic and antitrust importance."

terms of whether the parent controls a majority of the voting stock of the subsidiary." (*Id.* at 12-13)

The Department has also used the majority-owned standard in formulating and administering numerous consent decrees in recent years. (*ABA Antitrust Consent Decree Manual* 52-53 (1979)) Similarly, this standard comports with Hart-Scott-Rodino principles (16 C.F.R. § 801) (controlling corporation is one holding 50% of outstanding voting securities).[20]

Either the wholly-owned or majority-control test will curtail antitrust liability in some cases, and require reversal in the present. It will not interfere, however, with legitimate enforcement concerns. In cases like *Yellow Cab*, Section 1 will remain available to challenge anticompetitive schemes effected through the creation or acquisition of wholly-owned subsidiaries, and integrated enterprises will remain subject to the single firm anti-monopoly standards of Section 2. Finally, state law remedies will retain their rightful role in scrutinizing the type of conduct alleged here. As Handler and Smart stress:

"[T]he common law of unfair competition reaches such behavior as . . . interference with contractual relations. While the law of unfair competition, unlike section 1, does not provide for treble damages, it makes little sense from an antitrust point of view to award treble damages for acts of unfair competition performed by a parent and its wholly owned subsidiary but not to do so when the

[20] Under such a standard, the question whether affiliated corporations are capable of antitrust conspiracy would be a fact issue only where the parent owns 50% or less of the voting stock of the subsidiary. Again, this is consistent with the Justice Department *Antitrust Guide For International Operations*, which states that, "when majority stock control is not present, the Department may make a careful inquiry into the facts of the particular case." (*Id.* at 13) Even in those circumstances, this Court should make clear that the focus should be on whether the parent has *legal* control of the subsidiary.

very same unfair competitive practices are carried out by a company through its division." (3 Cardozo L. Rev. at 71)

II. This Court Should Confirm That Defendants Cannot Be Found Liable In Rule Of Reason Cases Without A Careful Analysis Of Market Structure And Market Shares To Establish An Adverse Effect On Competition.

The prospect of recovering treble damages and attorneys' fees gives plaintiffs powerful incentive to cast state tort actions as federal antitrust claims, and to portray private injury as injury to competition. If state business tort law is not to be swallowed by the antitrust laws, and the federal courts swollen with commercial grievances masquerading as antitrust claims, this Court must insist that the lower courts demand—as the courts below did not—a persuasive demonstration of injury to competition, and not simply injury to a competitor. *See Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). In particular, this Court should reject the Seventh Circuit's conclusion that, in rule of reason cases, it is unnecessary to examine the structure of the relevant market or to assess whether defendants possess sufficient market power to have an adverse impact on *competition* in that market.

Both the courts below identified the relevant market as structural steel tubing. (691 F.2d at 315; App. A-5; App. B-7) It was undisputed that this market was competitive before, during and after the assertedly conspiratorial actions that temporarily blocked respondent's entry. It was equally undisputed that Regal's market share (to which Copperweld added nothing) did not approach the threshold for a finding of monopolization or attempt to monopolize. In fact, respondent dropped its Section 2 claim following discovery. (*See* p. 5 *supra*) Yet, neither of the courts below gave any consideration to these market realities. Indeed, they viewed an examination of market shares and market structure as unnecessary to a resolution of the issue of competitive impact.

Thus, the district court refused to give instructions on the importance of market structure and market share evidence, rendering it impossible for the jury to make a meaningful evaluation of the competitive impact of the challenged conduct.[21] Likewise, the Seventh Circuit assumed, without a critical review of the structure of the steel tubing market, that the exclusion of respondent necessarily led to a diminution of competition: "[T]he injury Independence claimed flowed directly from the defendants' conspiracy to keep it from going into business *as their competitor*, a clear violation of Section 1 of the Sherman Act." (691 F.2d at 322; App. A-20)

Correct economic analysis and judicial decisions from other circuits demonstrate, however, that the competitive effects of the exclusion of a competitor can be assessed only after considering the level of concentration in the relevant market, the number of competitors, and the dispersal of their market shares.[22] The Seventh Circuit was particularly in error in believing that market share analysis is required only where "an actual competitor is harmed or driven out of business," but not "in a foreclosure case" involving a potential new entrant. (*Id.* at 323; App. A-22) The court ignored the substantial body of economic teaching—developed under Section 7 of the Clayton Act, but equally applicable

[21] The Seventh Circuit's assertion that the trial judge did not preclude closing argument and instructions on market shares (691 F.2d at 322 n.20; App. A-21) does not comport with his rulings: "I hope we don't get closing argument about market share . . . . Because I have no more desire to hear you argue about market share, either of you, than I did to hear the testimony about market share, since I don't understand the relevance of it. . . . [Y]ou know what instructions I propose to give and you won't find anything in there about market share. . . ." (Tr. 4784-85)

[22] *E.g.*, *Northwest Power Products, Inc.* v. *Omark Indus., Inc.*, 576 F.2d 83, 89 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979). *See also Kaplan* v. *Burroughs Corp.*, 611 F.2d 286, 291 (9th Cir. 1979), *cert. denied*, 447 U.S. 924 (1980); *Robert's Waikiki U-Drive, Inc.* v. *Budget Rent-A-Car Systems, Inc.*, 491 F. Supp. 1199 (D. Hawaii 1980).

here—that the foreclosure of a new entrant will have no anticompetitive effect where the relevant market is already competitive. As this Court stated in *United States* v. *Marine Bancorporation, Inc.*, 418 U.S. 602, 630 (1974):

> "The potential-competition doctrine has meaning only as applied to concentrated markets. That is, the doctrine comes into play only where there are dominant participants in the target market . . . with the capacity effectively to determine price and total output of goods and services. If the target market performs as a competitive market in traditional antitrust terms, the participants in the market will have no occasion to fashion their behavior to take into account the presence of a potential entrant."[23]

The other reasons advanced by the Seventh Circuit for rejecting a careful market share analysis also lack merit. The court suggests that such an analysis was obviated by the trial court's instruction that: "Independence must establish by a preponderance of the evidence that the delay in its entering into business resulted in a decreased supply or higher prevailing prices in the market *or otherwise adversely affected competition in the relevant market.*" (691 F.2d 322; App.

[23] Part of the Seventh Circuit's difficulties stems from its misapprehension of the market analysis that is required in a potential competition case. The court suggests that a focus on market shares should be inapplicable in the present case because Regal's market share would not have "*increased* as a result of Independence's foreclosure from the market." (691 F.2d at 323; App. A-22) But this would be equally true in a Section 7 context; the firm that acquires a potential competitor does not thereby increase its market share. In neither case, however, does this mean that market analysis should be dispensed with—as the *Marine Bancorporation* case demonstrates. The court of appeals also erred in believing that Regal "maintain[ed] its market share so long as Independence was kept out of the steel tubing business, but lost ground to Independence once the latter began production." (*Id.*) No "concession" to this effect was made by petitioners and the record was to the contrary. (*Compare* Tr. 4777-79 and PX 27)

A-21) Stated as it was in the alternative, however, this tautological instruction told the jury only that it could find an adverse effect on competition if respondent showed an adverse effect on competition. Even the first two alternatives gave the jury no guidance on how it could find an effect on price or supply in a market that was structurally and functionally competitive. This failing was especially troublesome since the only economist who appeared at the liability trial testified that the elimination of respondent's supply had no impact on price. (Brozen Tr. 5462-65, 5613-14)

Finally, the Seventh Circuit is mistaken that market shares need not be examined so long as the relevant market is "defined with enough generality to ensure that harm to competition is not assumed where no more than harm to a person engaged in interstate commerce is shown." (691 F.2d at 322; App. A-21) By itself, a correct market definition provides no insight into whether there has been any adverse effect on competition. It is the beginning, not the end, of a proper competitive analysis.

This Court should act to rectify the result and the reasoning below. The Court should make clear that adverse effect on competition in rule of reason cases cannot be established where the defendants lack sufficient market power to affect competition in the relevant market. The Court should reaffirm that no resolution of this issue can be made by the fact-finder or the reviewing court without a careful examination of market shares and market structure. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 527-28 (1948) ("In determining what constitutes unreasonable restraint, . . . we look . . . to the percentage of business controlled, the strength of the remaining competition . . . and other characteristics of the market.")

CONCLUSION

For the foregoing reasons, a writ of certiorari should be issued to review the judgments and opinion of the Court of Appeals for the Seventh Circuit.

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